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No. 87-954

In the Supreme Court of the United States

OCTOBER TERM, 1987

KANSAS CITY AREA TRANSPORTATION AUTHORITY,

Petitioner,

vs.

4550 MAIN ASSOCIATES, A PARTNERSHIP, FRANK S. JENNINGS

and

FRED E. CULVER,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE MISSOURI COURT OF APPEALS WESTERN DISTRICT

PETITIONER'S REPLY MEMORANDUM

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PETITIONER'S REPLY MEMORANDUM

I. The decision of the Missouri Court of Appeals is a final judgment for jurisdictional purposes.

In petitioner's Statement of Jurisdiction petitioner noted that the state court opinion did not dispose of respondents' counterclaim damages for rents and profits. It is not to avoid this insignificant matter that petitioner now seeks relief from the Court. Rather, petitioner needs the immediate review of the Court so that the right-of-way will not be lost to public use.

Under Missouri law, title to the fee underlying a railroad right-of-way is presumed to be in the abutting landowners. Upon abandonment, those abutting landowners own the fee free from the railroad easement. As a result of the opinion of the Missouri Court of Appeals the ownership of the right-of-way is, to say the least, in doubt. Petitioner cannot possibly manage the right-of-way and proceed with the planning and development of a light rail mass transportation system in the face of thousands of claims of abandonment by the abutting property owners. Absent a Writ of Certiorari, it may reasonably be expected that many abutting property owners will decide to use and develop the windfall property accretion decreed by the state court. For practical purposes, the right-of-way will be lost. Under such circumstances, the Court has recognized that pragmatic principles justify a finding of finality. (See cases cited in petitioner's jurisdictional statement.)

II. The federal question was properly presented and preserved for review at each court below.

Respondents' argument that somehow petitioner failed to preserve for review the federal question is without merit. It is clear that petitioner did raise the federal question prior to trial, at trial and then again on appeal. (See Petition, pp. 8-9) In fact, the cardinal point asserted by petitioner in its brief on appeal was that "The verdict and judgment of the Court should be upheld because the evidence demonstrates that, as a matter of law, the Country Club Right-of-Way had not been abandoned." The point made the following argument: 1) the ICC had exclusive jurisdiction over the right-of-way which jurisdiction was exercised by various ICC orders relating to the right-of-way through November 2, 1981; 2) the ICC not only did not authorize an abandonment prior to Novem-

ber 2, 1981, it specifically ordered that no abandonment could occur until that date; 3) before November 2, 1981 petitioner, KCATA, purchased the right-of-way for use in a light rail mass transportation system.

It is inconceivable that respondents now contend that petitioner has waived or failed to preserve the federal question. Nor do the authorities cited by respondents support their contention. In both *Morley Construction Co. v. Maryland Casualty Co.*, 300 U.S. 185 and *Massachusetts Mutual Life Insurance Co. v. Ludwig*, 426 U.S. 479, the Court held that, without a cross appeal, "an appellee may urge in support of a decree any matter appearing in the record although his argument may involve an attack upon the reasoning of the lower court or an insistence upon matter overlooked or ignored by it." 300 U.S. at 191; 426 U.S. at 481.

It is obvious that this is precisely what petitioner did in arguing on the state appeal that the judgment should be upheld because the application of federal law required it.

III. The ICC imposed its "public use" condition on its Certificate permitting abandonment so that Freight Operation was required to offer the right-of-way for sale for public purposes before otherwise disposing of it.

Twice in their Brief respondents disingenuously suggest, for the first time, that the ICC did not impose its "public use" condition on its Certificate permitting abandonment. In their Statement of Facts, on page seven, respondents say: "On October 30, 1981 the Interstate Commerce Commission issued its corrected Certificate

of Abandonment and Decision, *deleting its prior finding that the right-of-way was suitable for alternative public uses, and removing the 180 day waiting period as a condition.*" (emphasis added) Then, on page fifteen, respondents say the "Certificate of Abandonment issued by the Interstate Commerce Commission on October 31, 1981, (sic) effective November 2, 1981, does not contain a finding that the right-of-way is suitable for alternative public purposes as required by 49 U.S.C. §10906."

Respondents either know nothing about the ICC or they are deliberately trying to mislead the Court. The public use condition of 49 U.S.C. §10906 prohibits a carrier from disposing of rail property, determined by the ICC to be suitable for use for public purposes, for a period of up to 180 days unless first offered for sale for public purposes (49 U.S.C. §10906 is reprinted in Petitioner's Appendix D, A25). In the ICC decisions dated August 19, 1981 (respondents' Appendix A, A24-25) and September 11, 1981 (respondents' Appendix A, A31), the ICC imposed the public use condition on this right-of-way. In fact, the ICC said, in its August 19, 1981 decision, "We agree with the court [Missouri Supreme Court in *KCATA v. Ashley,* 555 S.W.2d 9 (1977)] that this unused right-of-way is suitable for other public purposes and should be so used."

This condition was not "deleted" or "removed" simply because the ICC did not reiterate it in every decision it rendered. Respondents cite no authority for their theory that the ICC, having found the right-of-way suitable for public purposes, meant to retract its finding and condition implicitly by failing to recite them over and over in its orders.

IV. The state court cannot avoid the pre-emption doctrine by misinterpreting the federal law of railroad abandonment or ICC decisions relating thereto.

The Court should not be misled by the simplistic argument made in Point III of respondents' Brief. Respondents say: 1) the ICC found a de facto abandonment of the railroad right-of-way; and 2) the ICC issued its Certificate permitting abandonment; and 3) thereafter the Missouri Court of Appeals applied state railroad abandonment law to determine ownership of the right-of-way property. Therefore, according to respondents, federal pre-emption is not an issue. (It is important to note that the state law issue of abandonment did not include a claim that KCATA had abandoned the right-of-way. Only the conduct and intent of the predecessor railroad, Freight Operation, was considered in the state court proceedings on the issue of abandonment. No one has suggested that KCATA has abandoned the right-of-way.) Respondents' argument, however, begs these important questions: Did the ICC have jurisdiction to find an abandonment? Was an abandonment permitted by the ICC prior to November 2, 1981 (which clearly it was not)? Could there be an abandonment of the right-of-way by Freight Operation when it sold the right-of-way to KCATA for public purposes pursuant to 49 U.S.C. §10906?

Whether or not the Missouri Court of Appeals chose to address these questions is not the issue. The pre-emption doctrine is not so frail as to lose its vitality simply because a state appellate court chooses to ignore it.

V. Title 49 U.S.C. §10906 does not require the immediate public use of railroad property sold thereunder.

Respondents argue, on page fifteen of their Brief, that 49 U.S.C. §10906 requires "present, feasible, alternative public uses." The language of the statute is set out in Appendix D of the Petition and it contains no requirement that the right-of-way be used immediately if sold for public purposes. Respondents' position is fundamentally flawed by its short-sightedness. A reasonable time for planning, acquisition, funding and development must certainly be contemplated by §10906 for projects such as proposed for this right-of-way. Nor can it be said that Petitioner is insincere about its intent to develop a light rail system. The ICC found, in its decision dated August 19, 1981 that KCATA was a "bi-state transportation authority with firm development plans for mass transit use of the right-of-way," (respondents' Appendix A, A21).

Petitioner has no quarrel with the holding in the Iowa case cited by respondents, *McKinley v. Waterloo Railroad Co.*, 368 N.W.2d 131. That case holds that 49 U.S.C. §10906 unquestionably permits a sale of a right-of-way and that the ICC can prohibit the railroad for 180 days from disposing of the right-of-way for private purposes. That is exactly what the ICC did here.

CONCLUSION

For the foregoing reasons and upon the authorities and arguments set out in the Petition, petitioner prays the Court to issue its Writ of Certiorari.

Respectfully submitted,

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